STATE OF MICHIGAN

IN THE SUPREME COURT

LINDA M. GILBERT,

Plaintiff-Appellee,

-vs-

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant,

_____/

Supreme Court
No. 122457

Court of Appeals
No. 227392

Wayne County Circuit
Court No. 94 409216 NH

BRIEF OF AMICUS CURIAE THE MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL

PROOF OF SERVICE

PLUNKETT & COONEY, P.C.
MARY MASSARON ROSS (P43885)
Attorneys For The Michigan Municipal
League Liability & Property Pool
535 Griswold, Suite 2400
Detroit, Michigan 48226
(313) 965-4801

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STATEMENT OF THE QUESTION INVOLVED

I.

DOES THE INTEGRITY OF THE ADVERSARIAL JURY TRIAL SYSTEM DEMAND (1) JUDICIAL ENFORCEMENT OF APPROPRIATE LIMITS ON ATTORNEY MISCONDUCT; (2) JUDICIAL GATE-KEEPING TO BAR USE OF SO-CALLED EXPERTS OFFERING OPINIONS THAT ARE NEITHER RELIABLE NOR HELPFUL TO THE JURY; AND (3) MEANINGFUL JUDICIAL REVIEW OF DAMAGES AWARDS FOR EXCESSIVENESS?

Gilbert Answers "No."

DaimlerChrysler says "Yes."

The trial court did not answer this precise question but would presumably say "No."

Amicus Curiae the Michigan Municipal League Liability & Property Pool says "Yes."

STATEMENT OF FACTS

The Michigan Municipal League Liability & Property Pool relies upon the statement of facts as set forth in defendant-appellant's brief on appeal.

ARGUMENT I

THE ADVERSARY PROCESS REQUIRES JUDICIAL INTERVENTION DURING AND AFTER TRIAL TO MAINTAIN THE INTEGRITY OF A JURY TRIAL AS A SOURCE OF SUBSTANTIAL JUSTICE AND TRUTHFUL FACT-FINDING.

The American legal system is committed to the adversary process as a means of resolving disputes. The "central concept of the adversary process is that out of the sharp clash of proofs presented by advocates in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society." Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St L J 713, 714 (1983). During trial, the "proof of facts and issues of law are contested by the two partisans in the presence and under the surveillance of an unbiased and presumably competent judge." Paul Lowell Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 Ind L J 445, 447 (1990) quoting Harry Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 Vill L R 957, 968 (1978). In the "ideal model of the adversarial system, impartial decision makers—judge, jury, or some combination thereof—render decisions based on evidence presented by competent advocates zealously representing their clients' interests in accordance with established rules." Nathan M Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L R 671, 674 (1997).

But the adversary system requires restraint "when [the advocate's] desire to win leads him to muddy the waters of decision." Lon Fuller & John D Randall, *Professional*

Responsibility: Report of the Joint Conference of the American Bar Association and the Association of American Law Schools, reprinted in 44 ABA J 1159, 1160-1161 (1958). Commentators recognize that "[e]laborate sets of rules to govern the pretrial and post-trial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics) are all important to the adversary system." Lansdman, *supra* at 715. Critics of adversarial excesses warn that today's "high levels of combativeness potentially threaten the effectiveness and legitimacy of trials." Marvin E. Frankel, *Partisan Justice 9* (1980) quoted in Rosemary Nidiry, *Note: Restraining Adversarial Excess In Closing Argument*, 96 Colum L R 1299 (1996).

To preserve the integrity of the adversary process, the judiciary must carry out its obligation to control the conduct of lawyers who are the court's officers and "re-focus . . . its efforts to insure that truth and justice are indeed the product of the adversary system." Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn L R 1, 19-22 (1984); Robert Aronson, *Professional Responsibility: Education and Enforcement*, 51 Wash L R 273 (1976). Arguably, the "only means of preserving any substantial portion of the system may be to control the excesses of lawyer hyperactivity through the infusion of active judicial management from institution of a case to its termination." Miller, *supra* at 19 citing Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 FRD 83, 92-93 (1983). To function properly, the adversary system needs to "provide advocates with a forum to forcefully and effectively present their arguments," but also "to constrain this presentation within appropriate bounds." Nidiry, *supra* at 1307.

The issues presented to this Court highlight this tension and require rulings that will strike a proper balance between these competing concerns. The Michigan Municipal League Liability and Property Pool urges this Court to adopt rules that will ensure the integrity of the process. Unless the courts take away a verdict that has been tainted by attorney misconduct, or one based on blatantly unreliable opinion testimony, no litigant can participate in a trial confident that the adversary process will result in a legitimate process likely to achieve a fair result. Instead, when tainted verdicts are permitted to stand, public confidence in the jury trial system decreases. The problem of abuse in the jury trial system is not self-correcting. Litigants are rewarded with huge verdicts, not on the basis of the sharp exchange of evidence and argument that has historically been employed to lead to a just result, but because of a litigant's improper efforts to inflame the jury using techniques that have no place in the courtroom. These problems have been increasing in Michigan courts as they have nationally.

The Michigan Municipal League Liability and Property Pool presents this amicus brief to discuss three such issues presented by the parties in this appeal. Plaintiff's counsel engaged in repeated misconduct that was intended to, and did, heighten the emotions in the courtroom and prejudice the jury against the defendant. He presented the jury with a false picture of the facts and law, offered a purported expert who was permitted to testify to opinions that could not be traced to any specialized knowledge, and urged the jury to award damages on the basis of impermissible grounds. Each of these tactics warrants a mistrial but in combination, that is even more necessary.

Like many aspects of the American legal system, the ability of the jury trial to work as a method of finding the truth and reaching substantial justice depends on checks and balances within it. If trials are permitted to become blatant efforts to confuse and prejudice the outcome by use of heightened rhetoric, impermissible arguments such as the not-so-veiled allusions to Nazi Germany in this case, and use of witnesses cloaked with the title "expert" who provide extensive testimony that is not based on scientific or technical principles, then no litigant can afford to go to trial. Appropriate judicial review is "important to the effective administration of justice, necessary to the maintenance of its moral authority, and integral to maintaining positive public perception of the system." Haines, *supra* at 463. This Court must examine the new trial issues presented here with a view toward adopting rules that make judicial enforcement of proper adversarial argument and testimony the norm—and not the exception. Amicus curiae the Michigan Municipal League Liability and Property Pool urges this Court to announce rules governing attorney misconduct, expert testimony, and review of damages that will maintain the integrity and well-being of the system as a whole.

A. A Jury Verdict Tainted By Attorney Misconduct Cannot Be Allowed To Stand.

H.L. Mencken once said that courtroom arguments were "not designed to unearth the truth; they were designed to conceal, maul and destroy the truth." H.L. Mencken, *Stewards of Nonsense*, American Mercury, January, 1928, pp 35-37, reprinted in A *Second Mencken Chrestomathy* (88 Vintage Books ed 1995). Although Mencken castigated the legal system for these deficiencies, his view was overly negative. To

"ensure the integrity of the process, tactics designed to harass or intimidate an opponent, as well as those intended to mislead or prejudice the trier of fact, are forbidden." Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St L J 713, 716 (1983). When such arguments are presented, Michigan courts require appellate review and a reversal if "what occurred may have caused the result or played too large a part or may have denied a party a fair trial." *Reetz v Kinsman Marine Transit Co*, 416 Mich 97; 330 NW2d 638 (1982). This is true even where the claimed error was not objected to at trial. 416 Mich at 103.

Unless the judiciary carries out this function, the substantial justice to be obtained through our adversarial jury system becomes nothing more than a legal fiction. One commentator warned that "crafty attorneys undoubtedly win jury cases they should not win." Franklin D. Strier, *Major Problems Endemic to the Adversary System and Proposed Reforms*, 19 WSU L R 463, 474 (1992). Another suggested that "[w]hen guileful trial attorneys, employing morally or ethically questionable practices, prevail in contravention of the true merits of a case, the systemic defect which this outcome evinces lies only superficially with the individual attorneys." Strier, *supra* at 478. Instead, it lies with the system including the courts that fail to enforce the rules that are intended to constrain such tactics. When the judiciary adopts a "hands-off" attitude, attorneys "can use the license the adversary system gives them to wrap whatever informational content their evidence and argumentation may contain with emotional appeals to favorably rouse, confuse, or otherwise bias the factfinder." *Id.* at 481. When the procedural and substantive limits on attorney tactics are not enforced, "reliable testimony may easily be

made to look debatable, and clear information may become obfuscated." Marvin E. Frankel, *The Search for Truth: An Unpireal View*, 123 U Pa L R 1031, 1094 (1975).

Like any system of checks and balances, the adversary system depends on each party performing its role. The advocates must present the parties' positions within the bounds of the rules; the judiciary must intervene—during trial or on appeal—where that has not occurred. See generally Strier, *supra* at 483. Active judicial involvement in enforcing the rules is an absolute requisite, a point that the Michigan Supreme Court clearly recognized in *Reetz*. This principle requires reiteration and amplification to ensure that both bench and bar carry out their proper role. Otherwise, the judiciary's failure to step in provides a competitive advantage to the lawyer whose tactics tainted the outcome in the first place. A Florida appellate court put it aptly:

> Even if life isn't fair, judges should endeavor, when the opportunity presents itself and it is legitimately within our means to do so, to assume that law is. This means that all parties to any litigation should compete on a level playing field unless inclines are placed on the field based on some recognized legal theory and even then the incline should be only as steep as justified by the legal theory authorizing it. [*Torres v Matsushita Electric Corp*, 762 So 2d 1014, 1018 (Fla App 2000)]

When trial and appellate courts "overlook all but the most inflammatory practices," expressing their disapproval of emotional appeals or distortions of the facts while, at the same time, upholding the verdict obtained as a result of them, the integrity of the system is cast into doubt. Widespread concern exists because attorneys "have been accused of using closing arguments to mislead juries about the law and evidence, and using emotionally laden tactics that distort the trial process." Nidiry, *supra* at 1308. See also

Michael J Ahlen, *The Need for Closing Argument Guidelines in Jury Trials*, 70 ND L R 95, 95-96 (1994).

When the ABA addressed the lawyer's role as an advocate in open court, it presented a discussion of the limits of partisanship that applies here:

> When advocacy is thus viewed, it becomes clear by what principle limits must be set to partisanship. The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature. [44 ABA J 1159, 1160-1161, 1216-1217 (1958) reprinted in ABA Section of Litigation: *Readings on Adversarial Justice: The American Approach to Adjudication*, at 180 (West, 1988)]

The trial record in this case is replete with improper attacks on DaimlerChrysler's nationality and corporate status, appeals to ethnic prejudices, attacks on opposing counsel, inflammatory rhetoric that was unconnected with or contrary to the facts in the record, and purposeful concealment of a longstanding close personal relationship with an expert witness. The huge verdict is unquestionable a product of these tactics. They were intended to divert the jury's attention from its role as fact-finder and stir the jury's emotions by pointing to irrelevant and prejudicial matters.

Michigan courts have repeatedly held that "[E]ach party is entitled to present its case on the merits, free from remarks of opposing counsel which may prejudice the jury and divert its attention from the real issues." *Wayne County Board of Road Comm'rs v GLS LeasCo*, 394 Mich 126, 135; 229 NW2d 797 (1975). When a reviewing court cannot be confident that the verdict would have been the same had the attack or argument

not been made, then a new trial is required. *Kern v St. Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978). The use of "language" that "evinces a studied purpose to inflame or prejudice the jury, based on facts not in the case" is ground for reversal. *Id.* See also *Firchau v Foster*, 371 Mich 75, 78-79; 123 NW2d 151 (1963).

The appellate court's apparent willingness to allow such a verdict to stand when it is irretrievably tainted by the blatant and repeated misconduct of plaintiff's counsel requires reversal. The record reveals a litany of emotional appeals such as the references to the German citizenship of DaimlerChrysler and its management. (Tr, 7/6/99, 26-28; 788a-790a). Plaintiff's counsel told the jury that DaimlerChrysler's strategy was to "blame the victim" and he compared it to "a time in this country when rape victims were blamed for being victimized." (Tr, 7/16/99, 6; 1293a). Plaintiff's counsel repeated this theme telling the jury, "I guess the defense that Daimler-Chrysler wants us to respond to is trust them when they put up charts that mislead and deceive.... And trust them as they say it is her fault. It is all her fault." (Tr, 7/16/99, 18-19; 1305a-1306a). These arguments are not an effort to summarize or argue the evidence; they are a clear effort to heighten the jury's emotions, to create anger and distrust of the defendant not on the basis of the evidence, but on the basis of the jury's feelings.

Repeatedly, plaintiff's counsel urged the jury to "imagine" the plaintiff's feelings, another request intended to divert from the trial testimony about her emotional and mental state to their own imagined feelings if put into the claimed situation. Plaintiff's counsel said, "My God, can you imagine how she felt not only being victimized every single day, as the evidence shows." (Tr, 7/16/99, 6; 1293a). Plaintiff's counsel went on

to accuse the DaimlerChrysler attorney of wanting to ignore the testimony. (*Id.*) He urged the jury to "imagine the feelings of not only being beaten down every day, but having no one who is willing at all to come to your aid or even listen to you or even give you credence." (Tr, 7/16/99, 6-7; 1293a-1294a). Warming to his theme, plaintiff's counsel again urged the jury to "imagine waking up every day to the defense that has been made in this case. Think about what Daimler-Chrysler attempted to do here. Think about what you heard yesterday. Daimler-Chrysler told you, ignore the evidence. Ignore.... Ignore the evidence. Ignore the witnesses." (Tr, 7/16/99, 8; 1295a). Plaintiff's counsel intermittently reminded the jury to "imagine the feeling of helplessness that she felt. Can you imagine it?" (Tr, 7/16/99, 17; 1304a).

By urging the jury to "imagine" the plaintiff's feelings, plaintiff's counsel focused their attention on their own hypothetical and imagined reactions rather than what the evidence showed about hers. Appeals "to jurors' personal situations, and attempts, in argument, to apply a hypothetical set of facts, like those involved in the case, to the jurors personally constitute reversible error." *Clark v Grand Trunk Western R Co*, 367 Mich 396, 400; 116 NW2d 914 (1962) (citing additional cases in which reversal has resulted from improper argument and emphasizing that improper argument may warrant reversal even if not objected to).

This misconduct was worsened by plaintiff's counsel's additional focus on DaimlerChrysler's trial tactics, repeatedly suggesting that its presentation of a defense was wrongful, amounted to lying, and was inappropriate and hurtful to the plaintiff. He told the jury, "They denied the truth to protect one thing and one thing only, money."

(Tr, 7/16/99, 17; 1304a). The closing argument included a diatribe against DaimlerChrysler with repeated accusations that they [the corporate defendant, its management, and its attorney] "lied" and "ignored the evidence." (Tr, 7/16/99, 8; 1295a). The emotional overtones implicit in the rhetoric were repeatedly heightened when plaintiff's counsel accused DaimlerChrysler of wrongful conduct in ignoring evidence or lying about events. (Tr, 7/16/99, 6-11, 20; 1293a-1298a, 1307a).

Plaintiff's counsel wove attacks on DaimlerChrysler's corporate status into the argument, telling the jury, "You don't allow a corporation of this size to beat down a woman every single day and then allow them to come in here and do the things they did." (Tr, 7/16/99, 12; 1299a). Plaintiff's counsel told the jury that "they want you to ignore the evidence that it is them that destroyed her health, destroyed her hopes, and destroyed her dreams." (Tr, 7/16/99, 15; 1302a). Plaintiff's counsel repeatedly told the jury that DaimlerChrysler was "about protecting their money over the lives of the people that they allow to be injured in the form and the manner and the extent to which they have allowed Linda to suffer for this seven years." (Tr, 7/16/99, 20; 1307a). Michigan courts have required a new trial for arguments based on the claimed wealth or corporate status of a defendant. See e.g. *Mortensen v Bradshaw*, 188 Mich 436, 442; 154 NW 46 (1915). See also, *Duke v American Olean Tile Co*, 155 Mich App 555, 562-563; 400 NW2d 677 (1986).

Plaintiff's counsel attacked the defense attorney's use of a chart announcing "If they had done one-tenth of the work that was done to put together a chart ...." (Tr, 7/16/99, 13-14; 1300a-1301a). He continued, "I could pull out 1,000 statements, you

notice that chart didn't say one of these statements. Not one. The chart was intended to deceive you." (Tr, 7/16/99, 14; 1301a). Plaintiff's counsel reiterated his attack on DaimlerChrysler's chart saying, "If they had spent one-tenth of the time that they had spent to make up a chart intending to deceive you to find and stop who was doing this to Linda, this would never have happened. And now, they are willing to do this. No, that is wrong. That is wrong." (Tr, 7/16/99, 14; 1301a). These suggestions that DaimlerChrysler's efforts to defend itself at trial were completely inappropriate and violate the most basic tenets of the adversary system, which relies on both sides forcefully but fairly presenting their case.

Plaintiff's counsel also attacked DaimlerChrysler for presenting proofs regarding other grounds for plaintiff's claimed emotional damages that predated her claimed injuries arising out of the employment issues. He castigated DaimlerChrysler for talking about Gilbert's abortion and childhood sexual abuse, saying "Now, she didn't ask to be sexually abused as a child, and she didn't ask for DaimlerChrysler to air that in public." (Tr, 7/16/99, 16; 1303a). He told the jury "why talk about an abortion, here. What in the world did that have to do with this case, that embarrassment. I apologize. Why in the world was that brought up in this case." (Tr, 7/16/99, 16; 1303a). These outbursts and attacks subtly and not-so-subtly told the jury that the very act of presenting proofs relevant to emotional damages causation was improper and should not have been done. They did not, as would have been proper, focus on the testimony to see whether the plaintiff and her witnesses had adequately demonstrated that her difficulties came from the claimed sexual harassment rather than from these earlier incidents. Instead, plaintiff's

counsel focused on the propriety of the defendant's trial strategy of questioning whether the plaintiff's damages came from the claimed sexual harassment - a point that was prejudicial to the defendant but not relevant to any fact properly in issue.

Plaintiff's counsel told the jury that "they have probably given us a very good insight into what Linda is going to have to face when she goes back to work." (Tr, 7/16/99, 20; 1307a). The statement is an invitation to the jury to also consider and base its verdict on hypothetical future sexual harassment. This too was improper and amounted to the injection of prejudice into the case.

Plaintiff's counsel repeatedly exceeded the bounds of zealous advocacy in other ways as well. His questions were laden with sarcasm, inflammatory rhetoric, and mischaracterizations of the record accusing DaimlerChrysler of lying and presenting evidence designed to mislead. He insisted that the defendant did nothing to stop the harassment, when the record shows that was not true.

In *Reetz*, this Court emphasized that a reversal is in order even without an objection and request for curative instructions. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97; 330 NW2d 638 (1982). If an appellate court is "not able to say that the jury was not diverted from the merits," then a new trial should be required. It is not enough for a reviewing court to wink at a pattern of pervasive misconduct or to fall back on the failure to object or the harmless error doctrine, when the record makes clear that the misconduct resulted in a miscarriage of justice. Enforcement of the limits of advocacy ensures fairness by providing litigants with a level playing field. Absent true appellate oversight, litigants will be rewarded with high verdicts for violating the rules with high

verdicts and the adversary system's integrity will be further tarnished. The Michigan Municipal League Liability and Property Pool urges this Court to make clear that judgments obtained on the basis of attorney misconduct will not be allowed to stand.

B. Judicial Gatekeeping Requires Barring Testimony From Purported Experts Who Offer Opinions That Are Neither Reliable Nor Helpful To The Jury Because They Are Not Rationally Derived From Any Recognized Scientific, Technical, Or Specialized Knowledge.

MRE 702 requires that the expert testimony be based upon recognized scientific knowledge. See *Nelson v American Sterilizer Co*, 223 Mich App 485; 566 NW2d 671 (1997). The word "recognized" connotes a general acknowledgment of the existence, validity, authority, or genuineness of a fact, claim, or concept, *Nelson*, citing *Black's Law Dictionary* (6th ed) p 1271; *Webster's New World Dictionary* (3d ed College Edition) p 1121. The adjective "scientific" connotes the grounding of an opinion in the principles, procedures, and method of science. *Nelson*, citing *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786, 2789; 125 L Ed 2d 469 (1993). The word "knowledge" connotes more than subjective belief or unsupported speculation. *Id.* When an expert's "factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.'" *Kumho Tire Co v Carmichael*, 526 US 137, 149; 119 S Ct 1167; 143 L Ed 2d 238 (1999). A textual interpretation of the rule, therefore, requires the courts to act as gatekeepers to make certain that only proper expert testimony is admitted at trial. This Court should clarify the guidance that can be gleaned from the language of the rule.

Michigan Rule of Evidence 702 requires a trial court to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. It is incumbent upon the trial court to determine whether the proposed testimony is derived from "recognized scientific . . . knowledge." MRE 702. See *Nelson*, 223 Mich App at 490. Such a showing requires the court to ascertain that if the proposed testimony contains inferences or assertions, their source rests in an application of scientific methods. The inferences or assertions must be supported by appropriate objective and independent validation based on what is known, such a scientific and medical literature. *Id.* See also, *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 678; 607 NW2d 123 (1999).

Although these requirements have always been embodied in a proper interpretation of the Michigan rules of evidence, they have recently received increased attention from courts and commentators. Michigan courts have always required rigorous scrutiny of expert testimony to ensure that a jury is not swayed by testimony from an individual claiming special knowledge and expertise but presenting opinions that were not reliably derived from that scientific or technical knowledge. See *Tobin v Providence Hospital*, 244 Mich App 626, 651; 624 NW2d 548 (2001). This obligation also goes to the heart of the integrity of the process. Likewise, in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the United States Supreme Court directed judges to more actively evaluate scientific evidence. This gatekeeping function also applies to skill or experienced-based

observations. *Kumho Tire Co v Carmichael*, 526 US 137, 149; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

Judicial gatekeeping and appellate review of the decisions are essential because juries usually lack any reliable or consistent basis for evaluating the credibility of expert witness testimony. *Confronting the New Challenges of Scientific Evidence*, 108 Harv L R 1481, 1509 (1995). Although trial judges may be reluctant to take on this task, evaluation of the scientific or technical reliability and validity of proffered testimony is critical to ensuring a fair process. "Junk science" in courtrooms has been described as "a hodgepodge of biased data, spurious inferences, and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill." Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1993 ed) p 3. Such "science" amounts to "a catalog of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and, now and again, outright fraud." *Id.*

Rarely has a case better-typified the disastrous results of allowing junk science into the courtroom. Here, Gilbert presented inflammatory testimony from two social workers on matters that were essentially medical. Stephen Hnat, untrained in either medicine or psychiatry, was permitted to testify that sexual harassment caused Gilbert to relapse into alcoholism. According to Hnat, chronic stress can "literally kind of fatigue the brain and at times disrupt normal brain mechanisms." (608a).

Hnat, an employee of plaintiff's counsel's law firm as a jury consultant whose specialty was in assisting plaintiff's counsel to play on juries to get large verdicts,

presented purportedly "expert" testimony that was calculated to, and did, further inflame the jury. Hnat compared plaintiff's situation at work to those in concentration camps, telling the jury that "normal people in concentration camps after a while began to suffer from major depressive disorders which are biological based mental illness of depression, simply because they were subjected day after day to abuse, humiliation and embarrassment." (608a). Warming to his theme, Hnat then told the jury that there was "[n]o question that she [Gilbert] developed a major psychiatric illness and review of the records indicates that, you know, the predominant diagnosis of subsequent treatment was not alcoholism. It was a major depressive disorder." (609a). Hnat underscored his view that Gilbert's depression was not related to her alcoholism, which predated the claimed harassment. (609a-611a) Instead, Hnat told the jury that when she got a job at Chrysler "she was probably as happy as she had ever been at that point and stable moodwise." (611a). Hnat told the jury that Gilbert's brain chemistry was "actually changed." (612a). Hnat traced Gilbert's problems to the workplace and told the jury that this "could kill her." (616a). He blamed her relapse on this as well. (621a). In Hnat's view, Gilbert's relapse was due to the job:

> [A]lcoholism is an allergic response to the brain. It's kind of like saying can you separate at the brain of a person who has ragweed from the ragweed? Well, if the ragweed weren't there, they would have reacted to the allergic reaction.
>
> Similarly, if the harassment hadn't been there, it's unlikely that she would have relapsed." [630a]

Hnat's testimony culminated in his dire prediction that "she's going to die from drinking

unless she stops." (677a). Hnat elaborated on his prediction by telling the jury that pancreatitis was a condition directly related to alcoholism, and would cause "the worse pain a person could experience." (683a). Hnat said it "is the most painful way to die." (*Id.*)

Hnat lacked the medical or psychiatric background necessary to speak to these issues. He was permitted to present to the jury exactly the kind of hodgepodge testimony with no discernible basis in scientific principles that Huber warned against. This is completely contrary to the requirements of Michigan rules of evidence.

Likewise, Carol Katz, another social worker, was permitted to testify as a fact witness but offered her opinion that Gilbert suffered from post-traumatic stress disorder. (742a-743a). She was also allowed to opine that the claimed harassment caused Gilbert's relapses, that such harassment was common in factories, and that it was caused by her gender and not other factors. (744a-756a; 764a-769a; 759a-763a; 770a-774a; 780a-785a). A trial court should not allow use of a fact witness to circumvent the requirements for expert testimony. Otherwise, the rules do not serve their purpose of ensuring only reliable opinion testimony is offered.

This Court should make clear that a verdict and damage award based on such impermissible and inflammatory testimony cannot be allowed to stand. A "'[l]et-it-all-in' legal theory creates the opportunity" for a jury to accept what amounts to "quackery on the witness stand." Huber at 3. Unless the judiciary adopts a strong stance against such testimony, trial lawyers will continue to offer it in an effort to obtain a verdict or to ratchet up the damages confident in the knowledge that a reviewing court will review the

record deferentially and more often than not conclude that any claimed error was harmless.

The prevailing attitude that erroneously admitted evidence was likely harmless should be decisively rejected by this Court. Otherwise, litigants will continue to offer clearly prejudicial and inappropriate testimony secure in the knowledge that any error will not take away a verdict while success will likely increase its amount. The harmless error doctrine was never intended to be used to protect judgments that have been influenced in this way. Unless there is a fair assurance that the judgment was not substantially swayed by the error, a new trial should be required. See e.g. *Kotteakos v United States*, 328 US 750, 765, n 13; 66 S Ct 1239; 90 L Ed 2d 1557 (1945); see also *Powell v St. John Hospital*, 241 Mich App 64; 614 NW2d 666 (2000).

The Michigan Municipal League Liability and Property Pool urges this Court to adopt a rule that requires appellate enforcement of the judicial gatekeeping mandated in MRE 702 to bar expert opinions that are neither reliable nor helpful to the jury because they cannot be traced to any recognized scientific analyses or principles. An especially significant aspect of judicial gate-keeping is the need for testimony explaining how the witness's special experience or knowledge "leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. FRE 702, Advisory Committee Note. "[T]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Daubert v Merrell Dow Pharmaceuticals, Inc*, 43 F3d 1311, 1319 (CA 9, 1995) quoting FRE 702, Advisory Committee Note. If a trial court has failed to perform its essential

role as gatekeeper, a new trial should be required.

Gilbert's purported experts failed to satisfy this test and their opinion testimony should have been excluded. Given the inflammatory nature of the testimony, the error cannot be seen as harmless. This Court should announce a rule that signals bench and bar that the gate-keeping requirements embodied in the rules of evidence are serious. A litigant who offers such testimony should know that proffering such testimony will imperil any verdict that is tainted with it.

C. Meaningful Judicial Review Of Damage Awards For Excessiveness Is Essential To The Process.

Remittitur is justified if the amount of a jury award is higher than the evidence will support. MCR 2.611(E)(1). In analyzing this question, this Court has emphasized that the inquiry should examine factors such as whether the verdict was "induced by bias or prejudice." *Palenkas v Beaumont Hospital*, 432 Mich 527; 443 NW2 354 (1989). The *Palenkas* Court taught that the "inquiry should be limited to *objective* considerations relating to the actual conduct of trial or to the evidence adduced." 432 Mich at 532. This Court also characterized a comparison of jury awards in analogous injury cases as "an objective means of determining the range of appropriate awards in such cases." 432 Mich at 538.

Palenkas stems from a long tradition of appellate review to ensure that the size of a verdict has not been secured by "prejudice, sympathy, or some unreasoned element of an important character [that] entered into the jury's consideration of the case." *Michaels v Smith*, 240 Mich 671; 216 NW 513 (1927). Recognizing that there is "no absolute

standard" by which a court can measure the amount of damages in a personal injury case, this Court has always carefully considered whether there is a claim that "the verdict was obtained by improper methods, prejudice or sympathy." *Cleven v Griffin*, 298 Mich 139; 298 NW 482 (1941). This Court, in upholding a verdict against a remittitur motion, has emphasized that "[t]here is nothing to indicate that the verdict was reached as a result of passion, prejudice, mistake of law or of fact, or that it amounts to an injustice to defendants or is contrary to the evidence." *Majewski v Nowicki*, 364 Mich 698; 111 NW2d 887 (1961). Such verdicts are allowed to stand only when they are "not shown to be the result of prejudice, passion, partiality, sympathy, corruption or inflammatory remarks." *Stevens v Edward*, 376 Mich 1; 135 NW2d 414 (1956).

Meaningful judicial review of the amount of damages awarded is essential to ensuring the integrity of the adversary process. The power of the courts to grant a new trial if the jury has acted from improper motives is well-established. See generally, *Gasperini v Center for Humanities, Inc*, 518 US 415; 116 S Ct 2211, 2222; 135 L Ed 2d 659 (1996) (citing cases). Review of the amount of damages is "a control necessary and proper to the fair administration of justice. . ." 116 S Ct at 2223. See also, *Virginia Ry Co v Armentrout*, 166 F2d 400, 406-408 (CA 4, 1948). The Second Circuit explained the critical role of the court in the process:

> The jury does not function alone, but in cooperation with the judge presiding over the trial. For centuries, in England and in America, this has been so. Without judicial supervision over what Blackstone called the "misbehavior" of juries, a trial by jury would lack one of "the essentials of the jury trial as it was known to the common law before the adoption of the Constitution." None of these essentials would be in the slightest degree altered or disturbed by the judge's supervision of the trial or by the

> appellate review of the rulings that in the aggregate constitute such supervision. See Moore's Federal Practice, Vol. 6, pp. 3827-8 See also *Galloway v. United States, 1943, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458.* [*Dagnello v Long Island RR*, 289 F2d 797, 805 (CA 2, 1961)]

The United States Supreme Court just recently reiterated that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasors." *State Farm Mutual Automobile Ins Co v Campbell*, 123 S Ct 1513, 1519-1520; 155 L Ed 2d 585 (2003). Meaningful review of a jury verdict is essential to ensure that the award is not arbitrary. "[D]e novo appellate review [is essential] to prevent excessive jury awards resulting from arbitrary passion or prejudice. . . ." *Liggett Group, Inc v Engle*, 2003 Fla App LEXIS 7500, * n 31 at 52 (2003) citing *State Farm*, 1235 S Ct 1513.

A Florida appellate court recently reviewed damages and its discussion is instructive. The court observed that the "trial was book-ended with prejudicial attorney misconduct which incited the jury to disregard the law because the defendants" were tobacco companies. 2003 Fla App LEXIS 7500, *53. The court focused on several forms of misconduct, including "inflaming the jury with racial pandering and pleas for nullification of the law—to secure entitlement to punitive damages" and making "legally improper arguments to the jury regarding the payment of any award, and personally vouch[ing] to the jury that the defendants would not go bankrupt." *Id.* at 54, 63. The court concluded that these and numerous other instances of misconduct required a new trial because the award was "not supported by the evidence and demonstrates that they jury was irreparably prejudiced in entering the grossly excessive" damage award. *Id.* at

74. The Florida court measured the prejudicial impact of the misconduct by considering the huge verdict. In other words, when a verdict is higher than usual and the trial was marred by attorney misconduct and error, the court should infer that the size of the verdict demonstrates that the error was prejudicial.

Like the Florida appellate court in *Liggett*, Michigan appellate courts have concluded that "where a verdict is grossly wrong, courts will infer that it is due, to a great extent, to such errors." *McDonald v Champion Iron & Steel Co*, 140 Mich 401; 103 NW 829 (1905). This principle should be reiterated here. This Court should require exacting scrutiny of any large verdict that is based on a trial tainted by attorney misconduct or improper expert testimony. When the record reveals multiple instances of attorney misconduct, then the normal deference to the jury's damages assessment becomes suspect. The court can no longer assume error was harmless when a huge verdict is awarded after a trial with multiple instances of prejudicial conduct. Instead, the size of the verdict should be seen for what it is: the result of a runaway jury inflamed by the very passion and prejudice that was intended by the attorney engaging in the prejudicial misconduct. The verdict size coupled with multiple instances of misconduct serves as a basis for finding that the outcome was tainted by the misconduct.

To preserve the integrity of the process, the verdict must be taken away and a new trial required. Such a rule facilitates the proper functioning of the adversary process. It encourages attorneys to avoid such misconduct since they will no longer be able to take advantage of the increased damages that often flow from steps taken to inflame a jury. Here, as in the Florida tobacco case, repeated instances of misconduct heightened

emotions, raised prejudices, and repeatedly diverted the jury from the proper issues in the case. As a result, to ensure the integrity of the process, a new trial is required.[1]

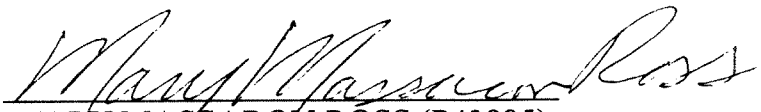
[1]Of course, a new trial is only required if this Court does not decide DaimlerChrysler's other arguments—not addressed in this brief—and does not grant JNOV. If the Court reaches these issues, then a new trial is warranted.

RELIEF

WHEREFORE, Michigan Municipal League Liability and Property Pool respectfully requests that this Court issue a decision that requires judicial enforcement of meaningful limits on attorney misconduct, judicial gatekeeping to bar use of so-called experts who offer opinions that are neither helpful nor reliable, and meaningful judicial review of damage awards.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

MARY MASSARON ROSS (P43885)
535 Griswold, Suite 2400
Detroit, Michigan 48226
(313) 983-4801

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